FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NOV 08 2005
JAMES R. LARSEN, CLERK
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RICHLAND, WASHINGTON

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

James S. Gordon, Jr., Plaintiff, vs. Impulse Marketing Group, Inc., Third Party Plaintiff Impulse Marketing Group, Inc., Third-Party Plaintiff, v. Jamila E. Gordon, Third-Party Defendant	Case No.: CV-04-5125-FVS MOTION TO DISMISS

TO: Clerk of the Court

AND TO: Floyd E. Ivey, Attorney for Third-Party Plaintiff

Dockets.Justia.com

COMES NOW the Third Party Defendant, Jamila E. Gordon, and files this motion to dismiss Third Party Plaintiff's claims and/or counterclaims under FRCP 12(b)(6).

Introduction

The undersigned is a pro se Third Party Defendant in the above captioned case. Even if Court assumes as fact all of the allegations of the Third Party Plaintiff as true, they still fail to state a claim upon which relief can be granted.

The Third Party Plaintiff has articulated claims against me for "indemnification and contribution", "fraud and deceit," "tortious interference with business relationships," "breach of contract," and "injunctive relief." Examining each in order reveals that even if the Court accepts all of the factual allegations contained within each claim, they amount to nothing more than an allegation that I "actively and affirmatively solicited commercial email messages" from the Third Party Plaintiff, and "represented" myself as myself in so doing. Such is insufficient to form a basis for liability under any of the theories offered by the Third Party Plaintiff.

The Third Party Plaintiff's claims for "indemnification and contribution" fail to state a claim upon which relief may be granted

The Third Party Plaintiff has brought a claim for "indemnification and contribution" against me. Through this claim, the Third Party Plaintiff is asking the Court to assign liability to me for emails the Third Party Plaintiff sent to my dad. While the Third Party Plaintiff has not explicitly pled RCW 19.190 et seq., absent the statute, there is no basis in law for recovery. Perhaps recognizing this, the Third Party Plaintiff has pled most of the elements of the statute, and has asked the Court to extend liability to those who provide "assistance or support" in the sending of emails, as is outlined in RCW 19.190 et seq.

While the Court should dismiss this claim, the Court should also make careful note of the Third Party Plaintiff's own view of RCW 19.190 et seq. in advancing these claims. By arguing that the mere act of subscribing to a spam list is all that need be done to establish liability for "assisting" the transmission of commercial electronic mail under the statute, the Third Party Plaintiff has set a very low threshold for "assisting." In so doing, the Third Party Plaintiff has conceded that its own much more involved conduct in transmitting the subject emails constitutes "assisting" the transmission of prohibited commercial electronic mail.

While I do not agree that the mere act of subscribing oneself or another to a spam list constitutes "assisting" the transmission of a commercial electronic email message under RCW 19.190 et seq - or that this conduct ever occurred, even if the Court assumes that it did, the Court should still dismiss this claim under FRCP 12(b)(6).

RCW 19.190 et seq. also requires that the party providing the assistance knows or has reason to know that the email (a) uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or (b) contains false or misleading information in the subject line. For obvious reasons, the Third Party Plaintiff has not included in its pleading an allegation that the emails in question contained any of these violations. In fact, the Third Party Plaintiff's pleading "wholly denies" that any such violations are present when it "wholly denies" any liability for any of these emails. Absent this element, the Third Party Plaintiff's pleading thus fails to state a claim upon which relief can be granted. Absent a violation of the statute, there is no liability for sending spam, or assisting others in sending spam. Since the Third Party Plaintiff's pleading does not include an allegation that the emails in question violated the statute, and in fact denies that this underlying violation occurred, it fails to state a claim upon which relief can be granted.

The Third Party Plaintiff's claims for "fraud and deceit" fail to state a claim upon which relief may be granted

Within its amended pleadings, Third Party Plaintiff alleges that I "affirmatively solicited commercial email messages" from the Third Party Plaintiff and misrepresented my identity in so doing. However, the Third Party Plaintiff's sole factual allegation concerning that misrepresentation is that I "fraudulently represented" that I was myself.

Under Washington law, to be entitled to recovery founded in fraud the Third Party Plaintiff must show the following nine elements: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block* 130 Wn.2d 486, 505 (1996). If the Court accepts as true the Third Party Plaintiff's sole factual allegation, that I represented myself as myself, it does not and cannot constitute fraud. If I represented myself as myself, such would be a true statement, it could not, by definition, be fraudulent. As such, the Third Party Plaintiff has failed to present a claim for which relief can be granted.

I also note that the Third Party Plaintiff repeatedly alleges that I and the other Third Party Defendants solicited emails for the "sole purpose of filing multiple lawsuits." However, even if we "intended" that the Plaintiff would file suit, no cause of action could possibly arise until and unless the Third Party Plaintiff actually sent emails that violate the RCW 19.190 (the statute). Since neither my dad nor I had any control whatsoever over either the Third Party Plaintiff's sending of emails or compliance with the statute, our "intent" prior to the Third Party Plaintiff's act of sending email that violated the statute is irrelevant to any and all of the Third Party Plaintiff's claims and counterclaims, including the fraud claim.

Finally, if the Court declines to strike the Third Party Plaintiff's claim for relief against both my dad and me for fraud under FRCP 12(b)(6), the Court should require that the Third Party Plaintiff comply with the requirements of FRCP 9(b) and state with particularity the circumstances constituting fraud by identifying the content of any and all statements made by us that the Third Party Plaintiff alleges were fraudulent, together with the date, time, place, mode of communication, and recipients of any such statements. Since the only factual allegation the Third Party Plaintiff has made (that I "fraudulently represented" that I was myself) is a true statement by definition, the Third Party Plaintiff has not done so, its complaint for fraud should also be dismissed on this basis.

The Third Party Plaintiff's claims for "tortious interference with business relationships" fail to state a claim upon which relief may be granted

Under Washington law, to be entitled to recovery founded in tortious interference with a business relationship, the Third Party Plaintiff must show the following five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that Third Party Plaintiffs had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that Third Party Plaintiffs interfered for an improper purpose or used improper means; and (5) Resultant damages. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 28, (1992). Within its pleadings, the Third Party Plaintiff's sole allegation related to element 4 is the allegation that I "affirmatively solicited commercial email messages" from the Third Party Plaintiff and misrepresented my identity in so doing. However, as has already been shown, the Third Party Plaintiff's sole factual allegation concerning that alleged misrepresentation is that I "fraudulently represented" that I was myself. As it cannot be an "improper purpose" or and "improper means" to accurately represent oneself as oneself, the Third Party Plaintiff's claim for relief for tortious interference with a business relationship fails to state a claim upon which relief should be granted and should be stricken under FRCP 12(b)(6).

The Third Party Plaintiff's claims for "breach of contract" fail to state a claim upon which relief may be granted

The Third Party Plaintiff's claims for "breach of contract" again rest solely on the factual allegation concerning that alleged misrepresentation is that I "fraudulently represented" that I was myself. As discussed above, such cannot form the basis of a breach, because even if I represented myself as myself, such would be a true statement, it could not, by definition, constitute a "breach." Further, as set forth by the Washington Supreme Court, "the burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention." *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, (1983) (citing *Johnson v. Nasi*, 50 Wn.2d 87, 91, (1957))." Within its pleadings, the Third Party Plaintiff alleges that we "never intended to allow Third Party Plaintiff to have a proper bargained for exchange of consideration." The Third Party Plaintiff's pleadings thus demonstrate conclusively that there was no mutual intention or exchange of consideration, and thus that no contract was ever formed.

Assuming, for the sake of argument, that there was a mutual assent, an exchange of consideration and a contract was formed, the question then becomes where is the breach? If the Court accepts the Third Party Plaintiff's pleadings as true, then we "solicit[ed] commercial emails for the sole purpose of filing multiple lawsuits." If true, then the filing of lawsuits cannot possibly form the basis for a breach, as the filing of lawsuits forms the very basis upon which the contracts were formed!

The Third Party Plaintiff cannot have it both ways. If the Third Party Plaintiff wants to allege the fact that the Plaintiff filed a lawsuit somehow constitutes a breach of a contract, then the Third Party Plaintiff must plead that my dad somehow agreed not to file suit as a condition of his "soliciting commercial emails." But they have not. Perhaps they have not because they recognize the absurdity of arguing that everyone who ever opted into their spam list somehow agreed not to sue them for their future illegal conduct in the process. Instead, the Third Party Plaintiff has pled that we entered into contracts "for the sole purpose of filing multiple lawsuits." If one accepts the Third Party Plaintiff's pleadings as true, then the right to file those lawsuits was intended by us to be a term of the contract. Accordingly, there can be no breach.

The Third Party Plaintiff's claim for relief against me for breach of contract should therefore be stricken under FRCP 12(b)(6). If the court accepts as fact everything contained within the Third Party Plaintiff's allegations, the sole factual allegation of breach in the pleading is an allegation that I "misrepresented" myself as myself. If I had somehow misrepresented myself as someone else, no evidence of this misrepresentation has been entered into the record of this case – as that evidence doesn't exist. Even if a contract was formed, the conduct alleged to be a breach was in fact a requirement of the contract. However, even if the Court accepts the dubious proposition that "contracts" were somehow formed as a result of our actions of opting into the Third Party Plaintiff's spam lists, the Third Party Plaintiff has not articulated any conduct by me that would constitute a breach of those alleged contracts.

The Third Party Plaintiff's claims for "injunctive relief" fail to state a claim upon which relief may be granted

By virtue of the fact that Third Party Plaintiff has not stated a claim on which relief can be granted concerning its first four claims, it is counterintuitive to seek or be granted an injunction based on the absence of a single actionable event by my dad or me.

The Third Party Plaintiff's claims for "injunctive relief" allege that if the Third Party Plaintiff is "unable to stop" our alleged "scheme and further schemes" the Third Party Plaintiff will suffer "irreparable damages." The Third Party Plaintiff has asked the Court to enter a preliminary injunction enjoining my dad and me from "actively and affirmatively soliciting commercial emails." However, regardless of whether my dad and I or the Third Party Defendants "actively and affirmatively solicit commercial emails," it is entirely within the Third Party Plaintiff's control whether any such emails are actually sent. And, it is entirely within their control to have all emails compliant with the strict requirements of state and federal laws. In fact, compliance with the federal CAN SPAM statute *requires* that the Third Party Plaintiff have the capability to remove email addresses from the Third

Party Plaintiff's spam lists. My dad has consistently sought to have the Third Party Plaintiff stop sending spam, (the polar opposite of the conduct alleged by the Third Party Plaintiff), there is no statutory or common law prohibition against soliciting commercial email, even if it is done with the intention to sue the sender. The Third Party Plaintiff's pleadings admit this, stating "Third Party Plaintiff has no adequate remedy at law." Perhaps the reason there is no such law is because any such law would be entirely unnecessary, as a spammer faced with such solicitations has a ready and simple defense; simply don't send commercial email that violates the statute.

Accordingly, the Third Party Plaintiff's claims for injunctive relief against me should be stricken under FRCP 12(b)(6). Even if the court accepts as fact everything contained within the Third Party Plaintiff's allegations, the mere act of requesting emails, whether by the Plaintiff, the Third Party Defendants, or anyone else, is perfectly legal conduct even if the person requesting emails intends to sue the sender. Further, the mere act of requesting emails, whether by the Plaintiff, the Third Party Defendants, or anyone else, is insufficient by itself to expose the Third Party Plaintiff to any liability. It is only when the Third Party

Plaintiff actually sends spam, an act over which the Third Party Plaintiff is in complete, total, and sole control, and further sends spam that does not comply with the statute, that any liability attaches.

CONCLUSION

The undersigned respectfully requests that the Court grant this motion to dismiss with prejudice the Third Party Plaintiff's claims and/or counterclaims against me under FRCP 12(B)(6).

Jamila E. Gordon
c/o James S. Gordon, Jr.
9804 Buckingham Dr.
Pasco, WA 99301
509-210-1069

Dated this 8th day of November, 2005

[signature]

I, hereby, certify that on November 8, 2005, I filed with this Court a Motion to Dismiss Third Party Plaintiff's Claims Against Third Party Defendant. The Clerk of the Court will provide electronic notification using the CM/ECF, which will send an electronic copy of this Certificate of Service to Douglas E. McKinley, Jr., Peter J. Glantz, Sean A. Moynihan, and Floyd E. Ivey. I have served all non-CM/ECF participants, Bonnie Gordon, James Gordon III, Jonathan Gordon, Emily Abbey, and Robert Pritchett by other means.